

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

-----X **Docket#**  
STEVEN SCHREIBER, : 15-cv-06861-CBA-JO  
Plaintiff, :  
 :  
- versus - : U.S. Courthouse  
 : Brooklyn, New York  
 :  
FRIEDMAN, et al., : February 2, 2016  
Defendants :  
-----X

TRANSCRIPT OF CIVIL CAUSE FOR INITIAL CONFERENCE  
BEFORE THE HONORABLE JAMES ORENSTEIN  
UNITED STATES MAGISTRATE JUDGE

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UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

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Proceedings

1 THE CLERK: This is Civil Cause for Initial  
2 Conference, Schreiber v. Friedman, et al., docket number  
3 15-cv-6861.

4 Counsels, please state your appearances for the  
5 record, starting with the plaintiff.

6 MR. NELKIN: Jay Nelkin for plaintiff Steven  
7 Schreiber.

8 THE COURT: Good morning.

9 MR. SCHAFHAUSER: Good morning, your Honor.  
10 Paul Schafhauser of Herrick Feinstein for  
11 defendants Neil Friedman and New York Best Coffee and  
12 with me, my colleague, Michelle Sekowski.

13 Good morning, your Honor.

14 MS. SEKOWSKI: Good morning, your Honor.

15 THE COURT: Good morning.

16 MR. GRANTZ: Good morning, your Honor.

17 David B. Grantz from the law firm of Minor &  
18 Landis on behalf of E&I Investors Group, LLC, E&J Funding  
19 Group, E&J Funding Company, LLC, E&J Management, Inc. and  
20 E& Jeryg Management Corp.

21 THE COURT: Good morning.

22 MR. FELDMAN: Good morning, your Honor.

23 Richard Feldman from Rosenberg Feldman & Smith  
24 on behalf of Michael Devine and Michael Devine, CPA.

25 THE COURT: Good morning.

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1 MR. BERGSON: Good morning, your Honor.

2 Rob Bergson, Abrams Garfinkel Margolis Bergson,  
3 on behalf of Geoffrey Hersko and Geoffrey Hersko P.C.

4 THE COURT: Good morning.

5 MR. BERGSON: Good morning.

6 MR. WALLER: Good morning, your Honor.

7 I represent 24 Hour Oil Delivery Corp., MB Fuel  
8 Transport Inc., MB Fuel Transport I, Inc., Associated  
9 Fuel Oil Corp., Light Trucking Corp., 165 Street Realty  
10 Corp. and Park Avenue Associates. I'm Brian Waller and  
11 I'm from Thompson Hine, LLP.

12 THE COURT: Good morning.

13 MR. FINKEL: Good morning, your Honor.

14 Richard A. Finkel. I represent Sylvia Ezell,  
15 Sonia Rivera, and Jorge Salcedo.

16 THE COURT: Good morning.

17 MR. HELLER: Good morning, your Honor.

18 Maury Heller from the firm of Garvey Schubert  
19 Barer. We represent Solomon Birnbaum, Office Coffee  
20 Services LLC, Single Service Beverages Distribution,  
21 Crazy Cups and 26 Flavors LLC.

22 THE COURT: Good morning.

23 All right, folks. Folks, let me just ask all  
24 of you, since we have so many people and we're making an  
25 audio recording that each time you speak, just identify

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1 yourself for the record, so that we do end up with a  
2 clear record.

3 All right. So we've got a few issues and maybe  
4 logically, the first thing to get to is the issue of a  
5 stay pending resolution of the anticipated motions to  
6 compel arbitration. And I'm happy to hear from all of  
7 you. I've read your letters, of course.

8 I think a couple of things that would be useful  
9 for me to have you address if you want to speak at all, I  
10 am happy to have you all rely on the papers but to sort  
11 of hone in, if you would, on specifically the extent to  
12 which a stay is in your view, required under controlling  
13 law or a matter of good practice and also, the extent to  
14 which each party seeking a stay is relying on its own  
15 arbitration agreement with the plaintiff or the view that  
16 it's somehow kind of (indiscernible) because of another  
17 parties' agreement with the plaintiff.

18 So whoever wants to be heard, Mr. --

19 MR. SCHAFHAUSER: Schafhauser.

20 THE COURT: Schafhauser, forgive me.

21 MR. SCHAFHAUSER: It's a tough name.

22 THE COURT: I'll get it.

23 MR. SCHAFHAUSER: Right. Thank you, your Honor  
24 and I appreciate it.

25 I guess I need to stand because I was the first

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1 one to send in a letter to your Honor, so let me explain  
2 the basis of my application. Others, of course, will  
3 speak for themselves.

4 My client is Neil Friedman, as your Honor  
5 knows.

6 THE COURT: Yes.

7 MR. SCHAFHAUSER: And Neil Friedman is the --

8 THE COURT: I know. That I part I get. He's a  
9 signatory as is Schreiber to the operating --

10 MR. SCHAFHAUSER: To the operating agreement.

11 THE COURT: Right.

12 MR. SCHAFHAUSER: And that's the basis of my  
13 argument that --

14 THE COURT: Yes.

15 MR. SCHAFHAUSER: -- arbitration is warranted.  
16 The reason I say that, your Honor, I appreciate that your  
17 Honor's read the papers but yesterday, and I'm kind of  
18 responding as well to Mr. Nelkin's submission, yesterday  
19 Mr. Nelkin said that perhaps discovery was necessary to  
20 determine whether parties had agreed to arbitration and  
21 the scope of the arbitration agreement.

22 That may be an argument that others need to  
23 address as to their clients but as to my client -- and  
24 that's why I stand -- as to my client, no discovery is  
25 needed. The operating agreement is essentially the

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1 premise upon which this entire lawsuit was commenced.

2 The operating agreement is named, specific performance is  
3 sought. The enforcement of the operating agreement is  
4 sought. So as to my client --

5 THE COURT: Can I ask --

6 MR. SCHAFHAUSER: -- there can't be any issue  
7 as to discovery as to arbitrability.

8 THE COURT: Okay.

9 MR. SCHAFHAUSER: That's my --

10 THE COURT: Thank you for telling me.

11 MR. SCHAFHAUSER: No, that's my argument.

12 THE COURT: If you're telling me I can't have  
13 any questions, I understand your position but if --

14 MR. SCHAFHAUSER: No, I of course --

15 THE COURT: -- you'll bear with me, please, I  
16 actually do have a --

17 MR. SCHAFHAUSER: Of course.

18 THE COURT: -- which specific arbitrable body  
19 is designated in the operating agreement?

20 MR. SCHAFHAUSER: Thank you.

21 THE COURT: Don't thank me for my questions. I  
22 have them whether you thank me or not. I just --

23 MR. SCHAFHAUSER: Okay.

24 THE COURT: You know, I'm trying to find out  
25 something.

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1 MR. SCHAFHAUSER: There actually is a form of  
2 body but no specific body is referenced.

3 THE COURT: So you guys could dispute --

4 MR. SCHAFHAUSER: It's a --

5 THE COURT: Excuse me. You guys could dispute  
6 which arbitrator is intended, correct?

7 MR. SCHAFHAUSER: That is correct.

8 THE COURT: Since the --

9 MR. SCHAFHAUSER: It says --

10 THE COURT: -- since the agreement is silent on  
11 the matter, is that something that's open to discovery?

12 MR. SCHAFHAUSER: Well, the agreement is not  
13 silent. What the agreement --

14 THE COURT: It says a beth din.

15 MR. SCHAFHAUSER: -- it says a beth din. It  
16 doesn't say the beth din. It says a beth din.

17 THE COURT: As opposed to the agreements that  
18 one of the other defendants is relying on, it specifies  
19 Beth Din of America which is --

20 MR. SCHAFHAUSER: Correct.

21 THE COURT: So given the silence as to the  
22 specific arbitrator, is that a matter for discovery?

23 MR. SCHAFHAUSER: No, your Honor.

24 THE COURT: Really?

25 MR. SCHAFHAUSER: Not in my view.



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1 THE COURT: Okay.

2 MR. SCHAFHAUSER: And again, I would never tell  
3 your Honor that you shouldn't be asking questions. I  
4 invite the question.

5 THE COURT: Not a second time anyway.

6 MR. SCHAFHAUSER: So the answer is that I don't  
7 believe that discovery is necessary as to that because  
8 under the Orthodox Jewish beth din procedure, the --

9 THE COURT: Wait, wait. The Orthodox Jewish  
10 beth din procedure, is there only one?

11 MR. SCHAFHAUSER: Well, there is a --

12 THE COURT: Is there only one view of what  
13 Orthodox Jewish law is?

14 MR. SCHAFHAUSER: Well --

15 THE COURT: Is there?

16 MR. SCHAFHAUSER: -- there answer is there may  
17 be different views but --

18 THE COURT: May be?

19 MR. SCHAFHAUSER: -- but --

20 THE COURT: Excuse me. May be or is --

21 MR. SCHAFHAUSER: Well, I'm --

22 THE COURT: -- are different views?

23 MR. SCHAFHAUSER: I'm not an expert as to  
24 Orthodox Jewish law but I believe there are competing  
25 views and I'm sure Mr. Nelkin has a different view than I

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1 do.

2 THE COURT: Okay. Is there one beth din  
3 procedure?

4 MR. SCHAFHAUSER: Whether there is one beth din  
5 procedure or --

6 THE COURT: It's going to work so much better  
7 -- I anticipate this is going to be a long litigation  
8 where we see a lot of each other.

9 MR. SCHAFHAUSER: Yes.

10 THE COURT: It will work so much better if when  
11 I ask a question, you answer the question I ask --

12 MR. SCHAFHAUSER: Very well.

13 THE COURT: -- rather than require me to ask it  
14 a second time.

15 MR. SCHAFHAUSER: Very well.

16 THE COURT: Is there one beth din procedure?

17 MR. SCHAFHAUSER: There is one beth din  
18 procedure contemplated in the operating agreement. There  
19 is --

20 THE COURT: Which one is that --

21 MR. SCHAFHAUSER: There may --

22 THE COURT: -- and how do you know?

23 MR. SCHAFHAUSER: -- it's the beth din  
24 procedure that references the beth din procedure in  
25 accordance with the Orthodox Jewish religion.

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1 THE COURT: So there's only one such procedure  
2 that is in accord with Orthodox Jewish law?

3 MR. SCHAFHAUSER: Again, your Honor, there are  
4 -- I am sure are others.

5 THE DEFENDANT: So then how do you know which  
6 one is contemplated by the agreement?

7 MR. SCHAFHAUSER: What we know is that --

8 THE COURT: No, how do we know which particular  
9 procedure is contemplated by the agreement?

10 MR. SCHAFHAUSER: We --

11 THE COURT: What do we look to to answer that  
12 question?

13 MR. SCHAFHAUSER: I believe that the agreement  
14 itself is clear, but if it is not --

15 THE COURT: How so? Please read to me the  
16 portion of the agreement that clarifies it.

17 MR. SCHAFHAUSER: Well --

18 THE COURT: Please read to me, sir, the portion  
19 of the agreement that clarifies the answer to that  
20 question because I didn't see it and I read it a couple  
21 of times.

22 MR. SCHAFHAUSER: The agreement provides, your  
23 Honor, in Section 11.2 --

24 THE COURT: The second 11.2, correct?

25 MR. SCHAFHAUSER: -- "That all disputes with

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1 respect to any claim for indemnification and all other  
2 disputes and controversies between the parties hereto,  
3 arising out of or in connection with this operating  
4 agreement shall be submitted to a beth din arbitration in  
5 accordance with the Orthodox Jewish religion."

6 THE COURT: Right.

7 MR. SCHAFHAUSER: That's what the agreement  
8 provides.

9 THE COURT: Right. But I asked you to tell me  
10 where in the agreement is specifies which of any number  
11 of potential candidates for the intended beth din  
12 procedure where it specifies which one of those it is. I  
13 thought that's what you were going to read to me.

14 MR. SCHAFHAUSER: Well, I can only tell you  
15 what the agreement says.

16 THE COURT: So there's nothing else in the  
17 agreement that answers the question.

18 MR. SCHAFHAUSER: There's nothing else --

19 THE COURT: Okay.

20 MR. SCHAFHAUSER: -- that I can point to, your  
21 Honor, in the agreement.

22 THE COURT: Okay.

23 MR. SCHAFHAUSER: And what --

24 THE COURT: So, go ahead.

25 MR. SCHAFHAUSER: -- what I -- I'm sorry, I

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1 didn't mean to speak over --

2 THE COURT: No, no, no. Please go ahead.

3 MR. SCHAFHAUSER: What I was attempting to  
4 point out is that even if there is a dispute as to which  
5 beth din should be the beth din under this agreement, I  
6 was --

7 THE COURT: Oh, no, which should be a beth din  
8 under the agreement. Let's try and take --

9 MR. SCHAFHAUSER: -- or a beth din --

10 THE COURT: If we're going to quote the  
11 agreement, let's try and get it right.

12 MR. SCHAFHAUSER: Even if there is a dispute as  
13 to the appropriate or a appropriate beth din under the  
14 agreement, that I respectfully submit is also an  
15 arbitrable issue that should be addressed by the --

16 THE COURT: How do you know which arbitrator to  
17 go for that question?

18 MR. SCHAFHAUSER: The -- again, there is a  
19 procedure -- there's a ZABLA procedure that was commenced  
20 by Mr. Friedman months ago and that is the procedure and  
21 that --

22 THE COURT: What if he says, as I think he has,  
23 you know, it's a different one, he has a heter from it?

24

25 MR. SCHAFHAUSER: He has and that heter, it's

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1 my understanding has been rescinded.

2 THE COURT: Is that correct, Mr. Nelkin?

3 MR. NELKIN: Your Honor, we received a letter  
4 from -- a e-mail from the beth din saying that heter was  
5 no longer applicable in their view. We have views as to  
6 the ability of beth din to render such a decision at such  
7 a length of time -- and basically whether an arbitrator  
8 can alter their rendered judgment more than a certain  
9 period of time afterwards.

10 THE COURT: All right. So we've got competing  
11 beth dins and within your beth din, a dispute as to  
12 whether a heter previously issued is in effect or not but  
13 you're saying, Mr. Schafhauser, that both of those  
14 questions are necessarily decided by the beth din that  
15 you say is the correct one, is that right?

16 MR. SCHAFHAUSER: What I am saying is that the  
17 heter was removed.

18 THE COURT: Is that right or not? I just want  
19 to know because you see if I ask a question and I ask if  
20 that's right, if you don't tell me if it's right or  
21 wrong, I'm still at sea.

22 MR. SCHAFHAUSER: It's right, your Honor.

23 THE COURT: Okay.

24 MR. SCHAFHAUSER: That's my position.

25 THE COURT: Okay.

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1 MR. SCHAFHAUSER: My position is that it's an  
2 arbitrable issue and should be subject to the beth din  
3 proceeding --

4 THE COURT: Before --

5 MR. SCHAFHAUSER: -- pursuant to the --

6 THE COURT: -- before which beth din?

7 MR. SCHAFHAUSER: -- ZABLA -- pursuant to the  
8 ZABLA that my client commenced.

9 THE COURT: I see. Okay. I understand the  
10 argument.

11 MR. SCHAFHAUSER: That's my position, your  
12 Honor. But in any event --

13 THE COURT: And the question I had started with  
14 is whether in your view a stay is mandatory under the  
15 applicable law of this jurisdiction or discretionary?

16 MR. SCHAFHAUSER: My -- well again, my  
17 position, your Honor, is -- and I cite to your Honor for  
18 instance, some of the cases that I put in the letter, for  
19 instance, PHC Mutual Insurance Company 569 F.Supp 2d at  
20 67, where the Court and I quote says, "Here, the Federal  
21 Arbitration Act requires that the Court resolve the  
22 threshold issue of whether the parties agree to mandatory  
23 arbitration before the litigation of this matter can  
24 continue."

25 So based on that precedent and others --

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1 THE COURT: Is --

2 MR. SCHAFHAUSER: -- my position would be that  
3 it is mandatory.

4 THE COURT: Okay.

5 MR. SCHAFHAUSER: That's my position.

6 THE COURT: What happens as to the claims  
7 against nonparties to the operating agreement?

8 MR. SCHAFHAUSER: I --

9 THE COURT: Assuming that discovery goes  
10 forward as to them, do you want to participate in it or  
11 not?

12 MR. SCHAFHAUSER: Well, I believe that those  
13 claims should be held in abeyance.

14 THE COURT: If I disagree with you --

15 MR. SCHAFHAUSER: It's not my application.  
16 It's their application.

17 THE COURT: -- if I disagree with you on  
18 that --

19 MR. SCHAFHAUSER: I'm sorry?

20 THE COURT: If I disagree with you on that,  
21 would you wish to participate in the discovery or not?

22 MR. SCHAFHAUSER: I would -- well, I haven't  
23 asked my client that precise question but my suspicion  
24 that -- my answer to your Honor, since I'm standing here  
25 before you, my answer is that my client bargained for a



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1 discovery proceeding before a beth din and so subject to  
2 what he might say in response to that direct question, I  
3 believe he was not to participate in discovery here but  
4 instead would wish to proceed in accordance with whatever  
5 discovery is before the beth din.

6 THE COURT: So in other words, if discovery  
7 proceeds as to the claims against nonparties to the  
8 operating agreement --

9 MR. SCHAFHAUSER: Yes.

10 THE COURT: -- and, you know, deponent X is  
11 deposed, your client would prefer that you not attend  
12 that deposition and just receive the transcript later.

13 MR. SCHAFHAUSER: I haven't asked my client  
14 that direct question.

15 THE COURT: Okay. Don't have to --

16 MR. SCHAFHAUSER: I --

17 THE COURT: -- to decide now.

18 MR. SCHAFHAUSER: I have to be straight with  
19 your Honor.

20 THE COURT: Of course you do.

21 MR. SCHAFHAUSER: I haven't asked that direct  
22 question.

23 THE COURT: Yes.

24 MR. SCHAFHAUSER: And I --

25 THE COURT: Okay.

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1 MR. SCHAFHAUSER: I'm struggling to answer a  
2 question I haven't yet asked him.

3 THE COURT: Okay. Well that's the kind of  
4 issue that --

5 MR. SCHAFHAUSER: What's that?

6 THE COURT: -- under my understanding of the  
7 division of responsibility for decisions, between counsel  
8 and client, something that counsel decides but if you  
9 prefer to have your client decide it, that's fine.

10 I take it if discovery goes forward also a  
11 claim involving the other defendants, in any event, Mr.  
12 Friedman is available as a witness to be deposed as to  
13 that claim, correct?

14 MR. SCHAFHAUSER: Well, Mr. Friedman is  
15 available, of course, under whatever the Federal Rules of  
16 Civil Procedure in these courts directives provide.

17 THE COURT: In other words --

18 MR. SCHAFHAUSER: But my position, to answer  
19 your question fully, is that discovery should not proceed  
20 and I understand your Honor's question presumes that it  
21 should --

22 THE COURT: And if you choose not to answer it,  
23 that's your business.

24 MR. SCHAFHAUSER: But Mr. -- well, I am trying  
25 to answer both questions.

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1 THE COURT: I thought I only asked one.

2 MR. SCHAFHAUSER: Your Honor asked me two  
3 questions, I think.

4 THE COURT: Okay.

5 MR. SCHAFHAUSER: Your Honor asked me a  
6 question of whether Mr. Friedman is available and the  
7 answer is of course he is not --

8 THE COURT: Okay.

9 MR. SCHAFHAUSER: -- a subpoena served on him.  
10 Of course he is going to comply with your Honor's  
11 directives and orders but what I would be -- and I want  
12 to be up front about this, depending on what happens down  
13 the road, it would be my position and I would very likely  
14 -- you're asking me a question on the fly but I would  
15 very likely apply for either a stay or to quash the  
16 subpoena because it would be subject to a beth din as to  
17 Mr. Friedman.

18 So my position would be yes, he's available in  
19 the sense of the federal rules. He'll comply with  
20 whatever your Honor directs but I don't believe it would  
21 be appropriate under the case law that I cited for  
22 discovery to be ongoing as to Mr. Friedman while -- if he  
23 is in a beth din. I presume no outcome of this  
24 application but if he is.

25 THE COURT: But you would agree that being --

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1 even assuming he is party to an enforceable arbitration  
2 agreement that requires the arbitration of claims as  
3 between himself and Mr. Schreiber, he is not -- that does  
4 not shield him from the obligation to give testimony in a  
5 civil dispute.

6 MR. SCHAFHAUSER: I agree.

7 THE COURT: Okay.

8 MR. SCHAFHAUSER: And that's easy -- I agree.

9 THE COURT: Okay.

10 MR. SCHAFHAUSER: So that's a yes.

11 THE COURT: No, but -- and this is all  
12 predicate to --

13 MR. SCHAFHAUSER: Yes.

14 THE COURT: -- to the extent that there are  
15 claims that may be going forward here anyway with  
16 discovery, that aren't subject to an arbitration  
17 agreement, and that are going to involve the discovery of  
18 matters in which your client will have an interest  
19 whether here or before beth din, before some beth din if  
20 one can be identified that is the proper one. And may be  
21 required to give testimony himself that would affect his  
22 interest, I am wondering why it wouldn't be most  
23 efficient for all of the discovery to be going forward on  
24 a single track before a single tribunal?

25 MR. SCHAFHAUSER: Your Honor is asking me a

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1 question about efficiency. I don't believe -- I mean, of  
2 course single tracks are always more efficient. So  
3 again, I want to give you a straight answer. Single  
4 tracks are always more efficient, of course, but I must  
5 point out that our position is efficiency is not the  
6 issue. My client's right to his bargained-for  
7 arbitration rights is what we are looking for here and --

8 THE COURT: Even if it's inefficient?

9 MR. SCHAFHAUSER: And --

10 THE COURT: Even if it's inefficient?

11 MR. SCHAFHAUSER: Even if it is inefficient --

12 THE COURT: Well, that's certainly your choice  
13 to do something that's inefficient.

14 MR. SCHAFHAUSER: Even if it is inefficient  
15 because efficiency -- again, it's the right to have a  
16 beth din decide an issue under Orthodox Jewish law with  
17 respect to Orthodox litigants. That's what my client is  
18 seeking to enforce.

19 But as to the efficiency question -- again, I  
20 want to answer your Honor's question --

21 THE COURT: You keep assuring me of that but  
22 you don't --

23 MR. SCHAFHAUSER: But one --

24 THE COURT: I'll assume that that's what you  
25 want to do and I'll judge you by whether you do it.

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1 MR. SCHAFHAUSER: Okay. But the answer is --

2 THE COURT: You don't have to keep telling me  
3 though.

4 MR. SCHAFHAUSER: -- the answer to the  
5 efficiency question, your Honor -- I appreciate it -- the  
6 answer to the efficiency question is the most efficient  
7 thing to do would be to either one, refer the entire  
8 matter to a beth din as all of the defendants will be  
9 seeking from Judge Amon or two -- or number two, refer  
10 the dispute between my client and the plaintiff to a beth  
11 din and stay the proceedings as the remaining defendants,  
12 so that the inefficiencies that your Honor is pointing  
13 out don't take place because your Honor is correct, of  
14 course, that two tracks would be most inefficient and  
15 that's exactly the premise of this motion to stay,  
16 precisely to avoid the inefficiency that your Honor is  
17 asking me about.

18 THE COURT: Without -- yes, that's inefficiency  
19 without prejudicing the rights of parties who are not  
20 bound to have claims resolved in arbitration maintain  
21 their access to the federal court.

22 Who else would like to be heard on this? I'm  
23 sorry, were you not finished?

24 MR. SCHAFHAUSER: Your Honor --

25 THE COURT: I'm sorry.

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1 MR. SCHAFHAUSER: I just wanted to add a couple  
2 of quick points, your Honor.

3 THE COURT: Yes.

4 MR. SCHAFHAUSER: The plaintiff as to -- again,  
5 as to my client, hasn't demonstrated any material issue  
6 of fact as to arbitrability, nor and -- by the way in the  
7 light of the removal of the heter, I don't believe  
8 there's an issue as to which beth din is appropriate.  
9 The heter has been removed as your Honor just heard from  
10 plaintiff.

11 THE COURT: Well, wait. Do you agree that you  
12 are prohibited under Jewish law from proceeding in this  
13 court, Mr. Nelkin?

14 MR. NELKIN: No, I do not.

15 THE COURT: Or by the terms of an arbitration?

16 MR. NELKIN: No, I do not.

17 THE COURT: Okay. I don't know who is right in  
18 this dispute but I am -- the record is manifested, there  
19 is a dispute about that.

20 MR. SCHAFHAUSER: There is a dispute and the  
21 last point and I --

22 THE COURT: There is a dispute but you just  
23 told me that there isn't.

24 MR. SCHAFHAUSER: Well, no, the --

25 THE COURT: So let's try to be careful about

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1 characterizing the positions of others, so as to avoid  
2 confusing me because I am easily confused when somebody  
3 tells me that turns out not to be so.

4 MR. SCHAFHAUSER: Your Honor, the dispute that  
5 I was referring to is a dispute as to whether this matter  
6 should go to arbitration and, of course, there's a  
7 dispute. That dispute, your Honor, is the subject of a  
8 pre-motion conference before Judge Amon as your Honor is  
9 well aware.

10 THE COURT: Yes, I'm familiar with the  
11 procedure. Is there anything else you would like to stay  
12 on the motion for a stay?

13 MR. SCHAFHAUSER: I simply submit that the  
14 Court should stay it at least pending the disposition of  
15 that motion. Thank you, your Honor.

16 THE COURT: Anybody else want to be heard on  
17 the issue of a stay? Yes, Mr. Sekowski (sic) -- no, I'm  
18 sorry, you don't have to -- Mr. Grantz, forgive me.

19 MR. GRANTZ: That's all right, your Honor. I'm  
20 representing E&J Funding --

21 THE COURT: Yes.

22 MR. GRANTZ: -- and E & Jeryg Management.

23 My issue is slightly different than Emil  
24 Friedman's issue and I think it's more inclined to New  
25 York Best Coffee's issue which is seeking a stay as not



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1 being a party to the agreement. In particular, the  
2 allegations that are being alleged against E&J Funding  
3 are that it's essentially an alter ego of Emil Friedman.  
4 That he lent the money or -- and their argument is that  
5 he didn't lend the money but there's clearly going to be  
6 evidence otherwise.

7 So you have this intertwined relationship  
8 between Emil Funding and E&J -- Emil Friedman and E&J  
9 Funding and our position is that to the extent that those  
10 two parties are inextricably intertwined, the --

11 THE COURT: You say they're not, right? You  
12 say that you're separate.

13 MR. GRANTZ: I'm not so sure --

14 THE COURT: Right?

15 MR. GRANTZ: -- I'm saying that they're  
16 entirely separate. You have Emil --

17 THE COURT: Is it an alter ego?

18 MR. GRANTZ: -- Emil Friedman is --

19 THE COURT: Is E&J an alter ego of Emil  
20 Friedman?

21 MR. GRANTZ: -- the principal -- I don't think  
22 it's an alter ego. I think Emil Friedman is the  
23 principal and I think that his money was used to fund E&J  
24 Funding, which is then used --

25 THE COURT: Okay. Is E&J -- does it respect

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1 the corporate formalities, and, you know, maintain a  
2 separate existence?

3 MR. SCHAFHAUSER: Yes.

4 THE COURT: Does it have an arbitration  
5 agreement with the plaintiff?

6 MR. GRANTZ: No.

7 THE COURT: Okay.

8 MR. GRANTZ: Nevertheless, the case law that we  
9 cited to the Court and to Judge Amon in our letter and  
10 the basis of how much we're asking for the stay is that  
11 because the allegations are they're intertwined and  
12 because they are a closely held corporation, that case  
13 law says that when you have one party who goes to an  
14 arbitration, the Courts have routinely sent  
15 nonsignatories that were so inextricably intertwined. So  
16 for that reason, the stay should apply to E&J Funding, as  
17 well as Emil Friedman.

18 THE COURT: I see. And in your view, is the  
19 stay of discovery pending the resolution of the  
20 arbitration claim or defense mandatory?

21 MR. GRANTZ: I'm sorry, say that again.

22 THE COURT: Is the stay of discovery mandatory  
23 in your view or is it discretionary?

24 MR. GRANTZ: My view is it's discretionary.

25 THE COURT: Okay. I don't read the cases to

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1 suggest that they are directing a court to stay discovery  
2 on a question but I do think that to the extent that this  
3 question is before Judge Amon and she's got to set --  
4 still has to set a pre-motion conference as related to  
5 the letters that we wrote on Friday, that any discovery  
6 should hold until at minimum, she has that pre-motion  
7 conference scheduled and we actually have that conference  
8 to determine whether or not she believes discovery is  
9 needed on any of these issues, including the question of  
10 arbitrability was raised yesterday in Mr. Nelkin's  
11 letter.

12 I think that issue should certainly not be  
13 addressed until we at least understand what the issue of  
14 fact is that Mr. Nelkin and Judge Amon believes there's a  
15 need for a trial on that issue or whether that can be  
16 decided by motion papers.

17 THE COURT: Okay.

18 MR. GRANTZ: Thank you, your Honor.

19 THE COURT: Thank you.

20 Mr. Feldman?

21 MR. FELDMAN: Yes, your Honor. With reference  
22 to your Honor's two questions, there is no arbitration  
23 provision between Michael Devine and the plaintiff or  
24 Michael Devine, CPA and the plaintiff and I believe that  
25 the stay is discretionary and not mandatory.

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1 THE COURT: Okay.

2 MR. FELDMAN: And your Honor should exercise  
3 discretion and Mr. Devine is a lynchpin of that exercise  
4 of discretion. He's an outside CPA who performed tax  
5 preparer work, income tax, sales tax, payroll tax. He  
6 didn't render a single opinion about the financial papers  
7 of Two Rivers.

8 In fact, yet another CPA from a different firm,  
9 did a review of the 2013. So instead, he's now faced  
10 with a tidal wave of discovery. Hundreds of categories  
11 of document demands, standing decades, well before Two  
12 Rivers was even created and for which the plaintiff is  
13 taken an expansive point of view as to what related to  
14 Two Rivers means.

15 THE COURT: Can I ask a question?

16 MR. FELDMAN: Sure.

17 THE COURT: Let's assume that everything in  
18 this case is stayed pending the outcome of arbitration by  
19 some beth din and how the decision will be made as to  
20 which beth din is authoritative in this matter. I have  
21 no idea because the agreement is silent. And let's say  
22 further that Friedman prevails as against Schreiber.  
23 What happens to the claim against -- the Civil RICO claim  
24 against your client? Does it eventually get resolved?

25 MR. FELDMAN: Well, of course. My client's --

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1 the claims against my client are derivative, aiding and  
2 abetting. If there is no wrong, you can't aid and abet a  
3 non-wrong. It would, by its very nature, must be  
4 dismissed.

5 THE COURT: Uh-huh.

6 MR. FELDMAN: Therefore, having to undergo  
7 literally hundreds of thousands or millions of dollars in  
8 legal fees --

9 THE COURT: Millions?

10 MR. FELDMAN: Well, it's a RICO case.

11 THE COURT: Millions?

12 MR. FELDMAN: According to the plaintiff and --

13 THE COURT: Excuse me. Excuse me. I am going  
14 to rely on everybody to give me their best understanding  
15 of what the issues are. So I just want to make sure  
16 because it's just -- it sounds surprising. Is it really  
17 a good faith estimate of yours that your client will have  
18 millions of dollars of discovery expenses?

19 MR. FELDMAN: High hundreds of thousands, if  
20 not millions because, your Honor --

21 THE COURT: Really?

22 MR. FELDMAN: -- the plaintiff has issued  
23 document production of over 600 --

24 THE COURT: Uh-huh.

25 MR. FELDMAN: -- because it's a RICO case, I

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1 cannot turn an eye from any of those categories of  
2 documents. I have to review them. He's asked for all  
3 the depositions of all of the parties plus nine  
4 additional nonparties and he's asked --

5 THE COURT: And that gets us to millions?

6 MR. FELDMAN: He's asked for --

7 THE COURT: And that gets us to millions?

8 MR. FELDMAN: I don't know, your Honor, because  
9 --

10 THE COURT: Okay. If you don't know, I don't -  
11 - we don't need to dwell on it. Keep going, please.

12 MR. FELDMAN: What I am saying is that there's  
13 literally a tidal wave of discovery that the plaintiff  
14 has said is related to Two Rivers.

15 THE COURT: I think you and I may have a  
16 different understanding of what literally means in that  
17 context but please continue.

18 MR. FELDMAN: He sent an e-mail at 12:38 last  
19 night saying I want to make arrangements to come and  
20 review and inspect all the documents relating to Two  
21 Rivers and he hasn't withdrawn his document request nor  
22 has he served new ones after the issuance of the  
23 preliminary injunction order. So I have to believe that  
24 that's what he is saying is related and it goes back from  
25 my client, decades dealing with nonparties which he

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1 wouldn't be asking me for, he would be abusing discovery  
2 by asking for these categories of documents if he didn't  
3 believe they were related to Two Rivers or his clients.

4           So I am now faced with having to defend a CPA,  
5 an accountant, who has been pulled into this controversy  
6 when we don't even know which forum the two major  
7 combatants will be fighting in, what the scope of that  
8 fight will be and my client's liability, if any, is  
9 derivative in nature, would go away if Mr. Friedman is  
10 successful.

11           THE COURT: I may just have this wrong, so  
12 anybody please set me straight. Was your client  
13 specifically identified as having a claim only on a  
14 theory of aiding and abetting or was it a civil -- was  
15 the claim that your client was liable for committing a  
16 civil RICO violation? And if somebody -- if anybody has  
17 it, I just don't have the complaint in front of me,  
18 unfortunately.

19           MR. NELKIN: Your Honor, we think that the  
20 complaint alleged that there was principal liability and  
21 not just aiding and abetting.

22           THE COURT: Did you plead aiding and abetting?

23           MR. NELKIN: I don't remember pleading aiding  
24 and abetting. We might have but --

25           THE COURT: Only of aiding and abetting?

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1 MR. FELDMAN: No, I believe -- beyond -- I  
2 believe he also alleged principal liability --

3 THE COURT: Right, that's what I thought, too.

4 MR. FELDMAN: Yes.

5 THE COURT: So even if Friedman prevails in the  
6 in a beth din, that doesn't necessarily mean that this  
7 case doesn't go forward later on the principal liability  
8 claim against your client.

9 MR. FELDMAN: It would, your Honor, because the  
10 allegations are that -- the principal allegations are  
11 that Mr. Friedman didn't loan money --

12 THE COURT: Perhaps principal but not only --

13 MR. FELDMAN: -- or didn't provide  
14 documentation for prior expenses.

15 THE COURT: All right.

16 MR. FELDMAN: If Mr. Friedman --

17 THE COURT: Look --

18 MR. FELDMAN: -- is successful at the beth din,  
19 that those expenses of Two River were in fact incurred  
20 and properly recorded, then there wouldn't be principal  
21 liability to the accountant.

22 THE COURT: All right. Thank you.

23 Yes?

24 UNIDENTIFIED SPEAKER: Your Honor, one --

25 THE COURT: Wait a minute.



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1 UNIDENTIFIED SPEAKER: I would just like --

2 THE COURT: One at a time.

3 UNIDENTIFIED SPEAKER: Okay.

4 THE COURT: Mr. Bergson?

5 MR. BERGSON: Yes, your Honor, Rob Bergson for  
6 Geoffrey Hersko.

7 To answer your questions directly, I think with  
8 respect to the stay as it applies to my client, it would  
9 be a matter of good practice, very good.

10 THE COURT: Okay, but not mandatory.

11 MR. BERGSON: Not mandatory.

12 THE COURT: Yeah.

13 MR. BERGSON: With one caveat to that, your  
14 Honor.

15 THE COURT: Yes.

16 MR. BERGSON: We've made an application to  
17 Judge Amon for a motion to dismiss the RICO claim which  
18 is the only basis for federal jurisdiction --

19 THE COURT: Sure.

20 MR. BERGSON: -- against my client. There are  
21 also legal malpractice claims against my client. The  
22 nature of the claims that the plaintiff has asserted  
23 against my client concern legal services that he provided  
24 to Two Rivers.

25 In the event that the motion to dismiss goes

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1 forward and it is granted, I believe that the stay claim,  
2 the legal malpractice claims should be dismissed. So on  
3 that grounds, I would say that a stay of discovery would  
4 be mandatory because the whole thing would be gone. So  
5 -- if we get to that point.

6 My client is not a party to an arbitration  
7 agreement, doesn't seek arbitration. However, he's  
8 caught up in a RICO claim. The principal defendant  
9 clearly, in my view, is subject to an arbitration  
10 agreement. If he is going to go to arbitration and the  
11 claims against him are in arbitration, it seems to me  
12 that logic dictates that that should run its course first  
13 before you go to the defendants on the periphery.

14 It would avoid inconsistent decisions and I  
15 think your Honor pointed out that if there was a dual  
16 track, there would be subpoenas, there would be parties  
17 that are perhaps subject to the arbitration that would be  
18 pulled into the civil litigation. It would be a mess.

19 THE COURT: I don't necessary agree with that  
20 on either point. First of all, I forget who -- I think  
21 it was Mr. Schafhauser who said that the demands of  
22 discovery within the arbitration are must less. So it  
23 wouldn't be that they're conflicting demands, so much as  
24 a greater demand here and a lesser demand in the beth  
25 din.

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1 But in terms of which would be resolved first,  
2 I've got to tell you, I've got a case involving parties  
3 agreeing among themselves, everybody agrees on having to  
4 do -- go along with what everybody things best. I only  
5 get involved if there's a dispute. But parties again  
6 with competing beth din selections, ultimately agreed to  
7 have the civil case stayed pending the resolution before  
8 beth din in 2009 and I've been getting status reports  
9 from them every six months since then, what's going on  
10 with the beth din and they said well, still there, still  
11 waiting. And I know it's going to be much more efficient  
12 in this court.

13 So I don't know that it's -- that the pendency  
14 of one and the other would necessary be enmeshed if we  
15 proceed in this court. It might actually be quite  
16 efficient.

17 MR. BERGSON: Well, your Honor, I just -- I  
18 can't visualize how we could possibly go forward with a  
19 RICO claim where the principal defendant is in beth din  
20 arbitration.

21 THE COURT: Okay.

22 MR. BERGSON: All right?

23 THE COURT: Maybe I will figure something out.

24 MR. BERGSON: At the very least, we have our  
25 pre-motion conference request to Judge Amon.

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1 THE COURT: Yes.

2 MR. BERGSON: They deal with dispositive  
3 issues. Discovery should at the very least be stayed  
4 until we have an opportunity to bring those before her.

5 THE COURT: Is that a general rule of practice  
6 in this Court that when a party seeks dismissal and has  
7 asked for a pre-motion conference, that all discovery  
8 must be stayed?

9 MR. BERGSON: I'm not aware that it is, your  
10 Honor.

11 THE COURT: I'm aware that it's quite the  
12 opposite.

13 MR. BERGSON: But I think under these  
14 circumstances --

15 THE COURT: Yeah.

16 MR. BERGSON: -- it would make good sense to do  
17 so.

18 THE COURT: All right. Thank you.

19 Anyone else? Mr. Heller?

20 MR. HELLER: Yes, your Honor. My client does  
21 have a separate arbitration agreement. It does specify  
22 specifically the Beth Din of America.

23 THE COURT: Yes.

24 MR. HELLER: And so on that store, we don't  
25 have that uncertainty as to where it might go.

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1 THE COURT: Right.

2 MR. HELLER: So that does distinguish us. Plus  
3 in addition, many of the clients or I say the majority of  
4 the clients involve my clients, attempt to form or frame  
5 this alleged conspiracy which they call the Friedman-  
6 Birnbaum conspiracy, to somehow harm Two Rivers, those  
7 claims to the extent that they have to go forward, would  
8 undoubtedly conflict with an arbitration of Mr. Friedman  
9 had he been given permission to do that, proceed  
10 separately because again, this is the Friedman-Birnbaum  
11 conspiracy. My client is Birnbaum. Those claims would  
12 be heard in arbitration. Those claims against my client  
13 should likewise go that way because of the linkage  
14 between the two.

15 THE COURT: Okay.

16 MR. HELLER: So under both.

17 THE COURT: Mr. Finkel, Mr. Waller, did you  
18 want to say anything?

19 MR. FINKEL: Your Honor, I would rely on what I  
20 submitted to the Court and what was considered before.  
21 Might I just add one thought. I cited to your Honor a  
22 decision by Judge Gleeson of this court, the Canada Dry  
23 case. I think that was a very thoughtful opinion  
24 rendered by Judge Gleeson on circumstances quite similar  
25 to the situation that your Honor faces here.

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1           There were claims, RICO claims in that matter,  
2 as well, as well as a host of other federal claims. Our  
3 case is a RICO case primarily. The case -- the principal  
4 defendant in this case is Mr. Friedman. My three clients  
5 were merely employees. They are dragged into this case,  
6 derivatively. They are charged aiding and abetting and  
7 conspiring. They are not, to answer your Honor's first  
8 question, they are not signatories to an arbitration  
9 agreement.

10           However, from my perspective, as I indicated in  
11 my papers, an arbitration decision whether Mr. Friedman  
12 prevails or whether Mr. Schreiber prevails, will  
13 effectively end the dispute that my clients are  
14 personally involved in because they have no interest,  
15 financial or ownership interest in Two Rivers and that's  
16 the gravamen of the case.

17           From my perspective, most respectfully, your  
18 Honor, it would be grossly inefficient to have a two-  
19 track case meaning an arbitration in a beth din and  
20 proceedings in this court for my clients and would  
21 reiterate what other counsel has said, it seems to me --  
22 again me, most respectfully, your Honor, that the most  
23 efficient root is to wait for Judge Amon to determine  
24 what she wants to hear with regard to the defendant's  
25 multiple applications for dismissal for arbitration and

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1 motions to dismiss.

2 I would think your Honor would be most  
3 respectfully again, best served by holding your Honor's  
4 decision in abeyance until we hear from what Judge Amon  
5 wants to do on the principal issue. Thank you.

6 THE COURT: Thank you.

7 MR. WALLER: Your Honor, just briefly, my  
8 clients are related to Two Rivers but the allegations in  
9 the complaint are that Mr. Friedman controls or has  
10 controlling interest in my clients and that he misused  
11 that control over my clients to improperly steal money,  
12 embezzle money, launder money from two Rivers. So my  
13 position has been well stated by the other counsel that  
14 have spoken but again, my clients were not signatories to  
15 any arbitration agreement. I do not believe that your  
16 Honor has -- it's mandatory upon the Court to stay  
17 discovery but as Mr. Finkel stated, and as Mr. Grantz  
18 stated, any issues that go to arbitration are effecting  
19 going to resolve the issues against my client.

20 Mr. Finkel's clients, some of them are  
21 employees of my client's. So for the same reasons,  
22 whatever gets determined in arbitration as to Mr.  
23 Freeman, should resolve whatever issues or allegations  
24 that are against my clients.

25 THE COURT: Thank you.

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1 Mr. Nelkin?

2 MR. NELKIN: Again, your Honor, I think that  
3 there are a number of issues. First, with respect to  
4 what types of issues might be subject to discovery, even  
5 if arbitration is in dispute, there's an issue in this  
6 case as to whether an arbitration has taken place.  
7 There's an issue as to whether parties have refused to  
8 arbitrate, whether they frustrated the arbitration  
9 process.

10 There's issues as to whether the claims at  
11 issue are encompassed by the arbitration clauses. There  
12 are issues as to what the respective relationships are  
13 with respect to certain defendants and certain companies.

14 The number of the counsel have misrepresented  
15 or misunderstood what our clients claims are against  
16 their companies. For example, with respect to Mr.  
17 Waller's companies, are allegations aren't with those  
18 companies, some of which have not been identified as  
19 having Mr. Friedman as a principal in their Rule 26(a)  
20 disclosures, falsely billed Two Rivers for work that  
21 wasn't done. Mr. Friedman wears a lot of hats. But just  
22 because he is a member of Two Rivers doesn't mean that he  
23 didn't do bad acts at those companies that these people  
24 represent.

25 THE COURT: But to the extent that he did bad



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1 acts at these other companies, does it not arise out --  
2 to the extent that you are harmed -- your client is  
3 harmed by it, does it not arise out of the agreement that  
4 they entered into to operate Two Rivers? In other words,  
5 you're saying Two Rivers is harmed because Friedman has  
6 been engaging in all sorts of shenanigans inside and  
7 outside his capacity as a principal of Two Rivers.

8 MR. NELKIN: I guess what I am saying, your  
9 Honor, is if in his role as let's say president of one of  
10 these companies, he submits false bills to Two Rivers and  
11 Two Rivers pays those bills, then I don't see how that  
12 arises out of the Two Rivers operating agreement.

13 THE COURT: Because he's acting ultra vires.

14 MR. NELKIN: No, because he's acting as a  
15 principal of the other company. He's prepared a false  
16 bill. He submitted it to Two Rivers and then Two Rivers  
17 paid that bill.

18 THE COURT: UH-HUH.

19 MR. NELKIN: Where is his role as a --

20 THE COURT: Okay. So in other words, if he --  
21 if in your view he breaches a fiduciary duty by causing  
22 another entity to engage in misconduct that you would be  
23 free to sue the other entity for, but for Friedman's  
24 participation, the fact that Friedman participates in it,  
25 doesn't mean that that misconduct is subject to

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1 arbitration.

2 MR. NELKIN: Yes, he doesn't get a --

3 THE COURT: Okay. I understand the argument.

4 MR. NELKIN: And if anything, I think that  
5 their argument, to the extent it's true, is approaching  
6 the problem backwards. If those companies did something  
7 wrong, it seems like you would have to determine whether  
8 they did something wrong before you've determined whether  
9 Friedman breached any duty under the operating agreement  
10 in somehow aiding and abetting it or facilitating it.

11 THE COURT: Okay. I understand.

12 MR. NELKIN: I think that an issue is is that  
13 the operating agreement is also governed by New Jersey  
14 law and we cited some cases, the Milan (ph.) case, the  
15 Conway case, but the State of New Jersey law which is  
16 slightly different than New York law is that even  
17 unambiguous agreements and certainly ambiguous agreements  
18 are subject to extrinsic evidence and parties can always  
19 bring in extrinsic evidence to interpret a contract.

20 And so in this case, we think that discovery  
21 may be necessary to figure out what the parties intent  
22 was with respect to any particular provision that's at  
23 issue.

24 THE COURT: All right.

25 There's an issue with the -- also as part of

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1 the -- what Mr. Schafhauser said, and this goes to the  
2 issue of the heter, we were told that the heter was no  
3 longer applicable because Mr. Friedman was willing to go  
4 to some other beth din but it was not as a ZABLA  
5 proceeding.

6 THE COURT: Not what?

7 MR. NELKIN: ZABLA proceeding. And so when Mr.  
8 Schafhauser says that he's seeking a ZABLA proceeding, I  
9 would ask your Honor to pin him down and to ask whether  
10 he's seeking to rely on a particular beth din or whether  
11 he's seeking a ZABLA because I think --

12 THE COURT: You know, forgive me folks, I know  
13 what a beth din is. I'm not familiar with ZABLA. So  
14 would somebody --

15 MR. NELKIN: I will do my best, your Honor. A  
16 ZABLA proceeding is -- there are many established beth  
17 dins, the Beth Din of America that Mr. Heller referred  
18 to --

19 THE COURT: Right.

20 MR. NELKIN: -- is an established beth din.  
21 They have rules. They have procedures. They have judges  
22 who are --

23 THE COURT: I get that.

24 MR. NELKIN: Okay. A ZABLA is if I don't agree  
25 to your selection of a beth din --

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1 THE COURT: Uh-huh.

2 MR. NELKIN: -- I can reject it. And I can  
3 suggest a different procedure. The different procedure  
4 is that we agree we can't agree on a beth din, so I get a  
5 rabbi, you get a rabbi and then collectively they decide  
6 to have -- pick a third rabbi and then those rabbis then  
7 create some sort of ad hoc thing where they decide what  
8 their procedures will be and generally there's a --

9 THE COURT: Does ZABLA refer to the panel of  
10 three rabbis?

11 MR. NELKIN: The ZABLA procedure refers to it's  
12 an acronym that, your Honor, I am --

13 THE COURT: Without getting into the Hebrew  
14 acronym --

15 MR. NELKIN: It basically means something along  
16 the lines of one for me and one for you and they pick a  
17 third.

18 THE COURT: It's the processing of picking the  
19 three rabbis who then select and if you disagree on  
20 anybody's side, if you disagree with the description  
21 again, please, let me know -- the process by which three  
22 rabbis select an existing beth din or cobble together a  
23 new beth din.

24 MR. NELKIN: No, what happens is is that that  
25 beth din is composed of one rabbi who is I guess

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1 considered to be your rabbi and then another one who is  
2 considered --

3 THE COURT: But that panel of three is itself  
4 the new beth din and they create procedures to resolve  
5 the dispute on an ad hoc basis?

6 MR. NELKIN: Well, theoretically but generally  
7 the ZABLA process is considered to be a path for abuse  
8 and a way to delay and stall and never reach a final beth  
9 din proceeding.

10 THE COURT: Whatever it's considered --

11 MR. NELKIN: But the short of it is --

12 THE COURT: -- what's your understanding of  
13 what it is?

14 MR. NELKIN: -- is the ZABLA is those three  
15 people would be the new -- would be the --

16 THE COURT: The new tribunal?

17 MR. NELKIN: Yes.

18 THE COURT: And they would determine the  
19 procedures by which a dispute is resolved?

20 MR. NELKIN: Correct.

21 THE COURT: Okay. Does anybody disagree with  
22 that? I just want to make sure I am understanding the  
23 terms you're using.

24 MR. SCHAFHAUSER: No disagreement, your Honor.

25 THE COURT: Okay. So you're -- and Mr.

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1 Schafhauser, you are saying that you want the dispute  
2 submitted to that process where Mr. Friedman would  
3 identify a rabbi, Mr. Schechter (sic) would identify a  
4 rabbi and those two rabbis would identify a third and  
5 that panel of three would determine the procedures for  
6 resolving the dispute?

7 MR. SCHAFHAUSER: There's one of two answers  
8 because two different things have happened and I -- two  
9 different things. What I was saying -- I was answering  
10 your Honor's question about what the procedure is if in  
11 the event of a dispute as to which rabbinical court,  
12 which beth din and your Honor has now heard we're in  
13 agreement as to what that procedure is.

14 Mr. Friedman did in fact -- that's my position  
15 -- commence a ZABLA back last summer. That itself as I  
16 think -- the one thing we can agree on is that there was  
17 a dispute as to what happened next and now we're  
18 referring to a second thing that has happened.

19 THE COURT: You know, but -- I am sorry, but  
20 there are too many apostrophes in that presentation, so  
21 that I don't understand what you're actually saying.

22 What's the current state of affairs? Do you  
23 both agree to submit the dispute to a ZABLA process under  
24 which Friedman and Schechter would each now identify a  
25 rabbi who -- and those two rabbis would then identify a

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1 third?

2 MR. SCHAFHAUSER: My client would be prepared  
3 to so agree, if he's willing to so agree.

4 MR. NELKIN: My client would not agree to that  
5 and does not believe that that's called for by the  
6 agreement.

7 THE COURT: Okay. Well, I understand the state  
8 of play. I am sorry. I interrupted you, so go have a  
9 seat and --

10 MR. SCHAFHAUSER: Thanks.

11 MR. NELKIN: What I was saying is that the beth  
12 din that issued our heter issued -- said that they felt  
13 it was no longer applicable because Mr. Friedman was  
14 prepared to go to another sitting beth din. If Mr.  
15 Schafhauser and his client are continuing to insist on  
16 the ZABLA process, then that is something that would be  
17 incompatible with what has been represented.

18 THE COURT: So you agree that if Mr. Friedman  
19 is willing to go to a specific beth din, one of his  
20 choosing, one of your choosing or chosen some other way.

21 MR. NELKIN: Now what our position is is that  
22 this case is properly in federal court.

23 THE COURT: No, no, no. I'm sorry. I wasn't  
24 phrasing the question well. The purported withdrawal  
25 that the heter is based on is the beth din's

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1 understanding that Mr. Friedman had agreed to do what  
2 exactly?

3 MR. NELKIN: Was willing to go to a sitting  
4 beth din.

5 THE COURT: That the -- the beth din that  
6 issued the heter had identified specifically?

7 MR. NELKIN: That the -- well, that he had  
8 represented to them and he specified which one it was.

9 THE COURT: Okay. Are you still willing to do  
10 that?

11 MR. SCHAFHAUSER: To go the beth din that was  
12 identified by the Mesharim (ph.)? We're willing to do  
13 that, as well.

14 THE COURT: Okay.

15 MR. SCHAFHAUSER: We're willing to do that,  
16 yes.

17 THE COURT: But you're saying if they are  
18 willing to do that, does that affect the withdrawal of  
19 the heter?

20 MR. NELKIN: We think that the heter once  
21 issued, and after a certain passage of time and the fact  
22 of Mr. Friedman's actions, cannot be withdrawn under  
23 existing law.

24 THE COURT: All right. Well, one thing that is  
25 quite clear is that there are a lot of unclear questions,



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1 factually and legally about the effect of the operating  
2 agreement's arbitration clause. That wasn't a question,  
3 so have a seat.

4 MR. SCHAFHAUSER: Thanks.

5 THE COURT: I'm sorry, go ahead.

6 MR. NELKIN: There are other issues that are  
7 important to the issue of arbitrability as well,  
8 including the corruption of any particular beth din. The  
9 one that he mentioned, Mesharim, is one that we can  
10 document people named in our complaint affiliated with  
11 Mr. Friedman, had given hundreds of thousands of dollars  
12 to and so corruption, inappropriateness of particular  
13 arbitration panels would be an issue, as well.

14 THE COURT: All right.

15 MR. SCHAFHAUSER: Just --

16 THE COURT: Okay. Folks, I am anxious to get  
17 onto other issues and other cases on my calendar. So I  
18 am going to take under advisement the issue of the  
19 request for a stay. I think I know where I am going but  
20 I do want to give some more thought to it.

21 We've got a couple of other issues. I want to  
22 address briefly issues that I think need to be resolved,  
23 in the event some or all discovery does go forward and  
24 let me start with -- you know, I think a lot of the  
25 disputes that appear from the submissions about how

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1 discovery would proceed could be resolved as they come  
2 up, particularly in a number of depositions and the time  
3 limit on them and I think we would all be better off  
4 seeing such disputes arise in context before trying to  
5 resolve them in advance.

6 Are there other issues as to how discovery  
7 would proceed if it's not stayed that any of you think we  
8 need to resolve today?

9 MR. SCHAFHAUSER: The only issue that we raise  
10 with respect to that, your Honor, is the protective order  
11 and your Honor may be thinking of that as a separate  
12 issue.

13 THE COURT: Well -- the protective order, let  
14 me go back to my notes here. I've got a lot of paper  
15 here I want to keep track of.

16 Yes, with respect to the protective order,  
17 again I don't want to engage in a long back and forth on  
18 this, I want you guys to go back to discussing this with  
19 each other. You did make certain commitments when we  
20 were together last that I expect you to honor but I don't  
21 expect in the absence of an agreement, to require anyone  
22 to go beyond what was agreed to previously with respect  
23 to keeping information from a client.

24 And in the absence of an agreement, there will  
25 simply be if discovery goes forward, a request that's out

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1 there and you respond or not but if you don't provide  
2 discovery because you don't like the fact that the  
3 plaintiff is going to see it, then I'll have to decide if  
4 the motion to compel should be granted or not.

5 But I do think you're all much better off  
6 because you understand the issues so much better than I  
7 can, coming up with an agreement as to precisely what is  
8 attorney's eyes only and what's not. To the extent you  
9 agree that what you want is for me to resolve that, I  
10 think you're better off doing it yourself but if you need  
11 me to do it, I will let you know that I'm generally very  
12 hesitant to say that a client can't see what counsel sees  
13 so that the counsel and client can work together and  
14 protecting against misuse of the information by having  
15 strict limits on what the clients can do with it. So use  
16 that as guidance to the extent that it's useful.

17 MR. SCHAFHAUSER: So just so I understand --

18 THE COURT: Yes.

19 MR. SCHAFHAUSER: -- your Honor is essentially  
20 directing us to meet and confer to resolve the issues.

21 THE COURT: Yes, absolutely.

22 MR. SCHAFHAUSER: Okay, thank you.

23 THE COURT: The last thing on my agenda, if  
24 there's something else you guys want to bring up, by all  
25 means, I got some correspondence yesterday about

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1 incidents involving the plaintiff's father and a  
2 synagogue in Florida. Mr. Schafhauser, is there anything  
3 in particular you want me to do?

4 MR. SCHAFHAUSER: What I was pointing out, your  
5 Honor, and I'm not looking to ask your Honor to do  
6 anything as to the plaintiff's father --

7 THE COURT: Then there's nothing I need to do.  
8 No, if you're not asking me to do anything, I don't even  
9 want to discuss it.

10 MR. SCHAFHAUSER: Not as to that, but what I  
11 was pointing out is that there are other issues that I  
12 also pointed out in the letter that do directly impact my  
13 client and --

14 THE COURT: What relief are you seeking? Let  
15 me start with that?

16 MR. SCHAFHAUSER: What I believe should be  
17 done, your Honor, is a directive that both sides continue  
18 to enjoy -- subject, of course, to whatever the  
19 preliminary injunction order provides, not what the --  
20 but both sides continue to have their rights as members  
21 of Two Rivers and that my client isn't shut off from an  
22 access to financial documents or be the same  
23 distributions that are ongoing for the plaintiff and, you  
24 know, Acura payments and this payment and that payment to  
25 plaintiff and his family members and yet my client is

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1 being shut off.

2 He's still -- I recognize that a preliminary  
3 injunction order was entered on consent. I recognize  
4 that. But he was not divested of his membership interest  
5 by that order or any other order. And I simply submit  
6 that a directive should be issued, that he continues to  
7 hold those rights and should be treated accordingly.

8 THE COURT: Mr. Nelkin, I issue a directive  
9 that all parties have all of the rights to which they are  
10 entitled under the preliminary injunction order. Does  
11 that satisfy you?

12 MR. SCHAFHAUSER: I believe that it actually  
13 goes back to the original order of Judge Amon, as well,  
14 and that the rights continue under the operating  
15 agreement except as modified by those orders.

16 THE COURT: Well, to the extent that the --  
17 look, to the extent that the preliminary injunction order  
18 modified any rights, all of the parties have to abide by  
19 the preliminary injunction order.

20 MR. SCHAFHAUSER: Of course.

21 THE COURT: To the extent that the preliminary  
22 injunction order left the operating agreement in place,  
23 the operating agreement controls but obviously you folks  
24 have very different ideas about what it allows and what  
25 it does not and I am not going to decide on an ad hoc

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1 basis what it does and doesn't allow. That's why you go  
2 to court, to have that resolved after appropriate  
3 litigation.

4           So again, if there's something specific you  
5 want me to do, I'll consider it but it sounds like what  
6 you're asking me to do is issue an injunction to abide by  
7 the Google motto and I don't think you need an injunction  
8 for me to do that.

9           MR. SCHAFHAUSER: I'm chuckling because of --  
10 I'm not asking your Honor to do that. I'm actually  
11 referring to what was discussed before your Honor. I  
12 wasn't here. My colleagues were here but what was  
13 discussed -- I read the transcript on December 14, where  
14 it was agreed -- a number of things were agreed. Mr.  
15 Pappa was going to serve as the essential financial  
16 bookkeeper of Two Rivers. A number of things were  
17 agreed. I cited them in my letter to your Honor  
18 yesterday. Mr. Nelkin recited all members would received  
19 X. All members would receive Y. I mean, it's in the  
20 transcript. I'm not asking for anything beyond what was  
21 already agreed before your Honor in the transcript.

22           THE COURT: Guys, I think if there's a dispute  
23 that you need me to resolve, it's going to be most  
24 helpful if you give me specific forms of relief that you  
25 think you're entitled to under specific orders of this

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1 Court. That will help refine the issue for me in the way  
2 that I would resolve it.

3 MR. SCHAFHAUSER: Further --

4 THE COURT: Right now, I don't think there's  
5 something for me to resolve.

6 MR. SCHAFHAUSER: I won't belabor the point.

7 THE COURT: And since there's nothing for me to  
8 resolve, I would like to go on -- if there's some other  
9 issue that somebody wants.

10 MR. SCHAFHAUSER: My only question, just a  
11 clarification is, may I do that by way of letter motion  
12 in accordance with your Honor's individual --

13 THE COURT: Anytime that you think that you  
14 have some right that needs to be vindicated that you  
15 cannot resolve after meeting and conferring with your  
16 opponent, you may seek relief --

17 MR. SCHAFHAUSER: Thank you.

18 THE COURT: -- pursuant to Rules 37 and --

19 MR. SCHAFHAUSER: Thank you.

20 THE COURT: (Indiscernible). All right.  
21 Anything else for today, folks?

22 MR. NELKIN: Your Honor, there's one or two  
23 things that I have. One is, we have a -- we would like  
24 to inspect the books and records that relate to Two  
25 Rivers pursuant to the preliminary injunction relief and

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1 we would like to have a schedule set as to a timetable to  
2 do that.

3 THE COURT: Well, have you talked to them about  
4 that?

5 MR. NELKIN: I have asked them to indicate if  
6 they're willing to do that and I was hoping that we -- if  
7 there's a dispute as to doing that, I'm -- I'm willing to  
8 schedule it, I just want to know if they will do it.

9 THE COURT: Have you --

10 MR. SCHAFHAUSER: Your Honor?

11 THE COURT: Before you respond --

12 MR. SCHAFHAUSER: Sure.

13 THE COURT: -- have you talked to them about  
14 that before asking me?

15 MR. NELKIN: Yes, I sent them in --

16 THE COURT: Okay. No, have you talked to them,  
17 picked up the phone and said hey, this is what I am going  
18 to raise in court if we can't agree on it. Have you done  
19 that?

20 MR. NELKIN: Only be e-mail, your Honor.

21 THE COURT: Guys, pick up the phone and talk to  
22 each other. This is not the place where you're going to  
23 do your negotiation in the first instance, all right?  
24 There is a preliminary injunction order in place. I  
25 expect you to abide it on both sides.



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1 Anything else?

2 MR. SCHAFHAUSER: No, your Honor. Thank you.

3 MR. NELKIN: Your Honor, I just have two  
4 technical questions, just as far as -- one is with  
5 respect to Mr. Ahearn, who has defaulted, as best we can  
6 tell in this case, your Honor entered an order that said  
7 that the defendants, which I believe we're talking about  
8 the people who had appeared, had until March 1st or 2nd  
9 to respond to the claim and answer. We would like to  
10 move to default Mr. Ahearn but we just wanted to make  
11 sure that that was not going to violate some order --

12 THE COURT: You can't violate an order by  
13 seeking relief that you think you're entitled to.

14 MR. NELKIN: I decided --

15 THE COURT: The only way you can get in trouble  
16 in that regard is by not conferring with an opponent  
17 before seeking leave but if your opponent hasn't  
18 appeared, you know --

19 MR. NELKIN: I was just hoping --

20 THE COURT: Okay.

21 MR. NELKIN: -- to clarify with your Honor that  
22 there wasn't anything that your Honor believed that had  
23 been agreed to.

24 THE COURT: I quite honestly don't recall if  
25 the extension to March 1st included Ahearn or not. If it

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1 did, don't -- you know you don't move, if it didn't, make  
2 your motion.

3 I will tell you that it's virtually always the  
4 case that default judgment proceedings, you know, live  
5 litigation are postponed pending the resolution of the  
6 claims and the defenses among the appearing parties. It  
7 doesn't mean you shouldn't make the motion for the entry  
8 of default but don't expect a default judgment where  
9 there are other parties litigating.

10 MR. NELKIN: Two other issues really quickly  
11 are to the extent that there is a Rule 11 type issue or a  
12 fraud on the Court type issue related to papers that have  
13 been submitted to this Court with respect to the issues  
14 that have been discussed today, are we -- do that by  
15 letter or do we -- how do we bring that to the Court's  
16 attention, given the fact that those are likely to be  
17 decided before the --

18 THE COURT: I have no idea of what you're  
19 talking about in terms of Rule 11. You know how Rule 11  
20 operates. The local rules prescribe how motions are to  
21 be raised. So please consult with those first.

22 MR. NELKIN: Okay. All right. And then the  
23 last issue was to the extent that we have issues with  
24 whether orders of this Court had been complied with,  
25 again and if we're seeking contempt, do we have to --

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1 THE COURT: Look, folks, this really isn't  
2 hard. If you think you're entitled to relief, make a  
3 motion. We have rules about how you make motions. I  
4 will ask Mr. Nelkin, once again, that you take the  
5 trouble to look at the rules about how motions are raised  
6 before asking the Court to tell you how to protect your  
7 client's interests.

8 MR. NELKIN: No, I understand that. I just --

9 THE COURT: All right. Anything else?

10 MR. NELKIN: No, your Honor.

11 THE COURT: Okay. Thank you, all. I have your  
12 proposed schedule, so in the event that I determine that  
13 discovery should proceed, I'll enter that and anyway,  
14 you'll hear from me after I've had a chance to reflect a  
15 little further on this.

16 MR. SCHAFHAUSER: Thank you, your Honor. Thank  
17 you for your time.

18 MR. NELKIN: Thank you.

19 (Matter concluded)

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C E R T I F I C A T E

I, LINDA FERRARA, hereby certify that the foregoing transcript of the said proceedings is a true and accurate transcript from the electronic sound-recording of the proceedings reduced to typewriting in the above-entitled matter.

I FURTHER CERTIFY that I am not a relative or employee or attorney or counsel of any of the parties, nor a relative or employee of such attorney or counsel, or financially interested directly or indirectly in this action.

IN WITNESS WHEREOF, I hereunto set my hand this 7th day of February, 2016.

  
Linda Ferrara

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